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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK ✓

BY: U. Adams

11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

12 IN AND FOR THE COUNTY OF YAVAPAI

13 STATE OF ARIZONA

14 Plaintiff,

15 vs.

16 STEVEN CARROLL DEMOCKER,

17 Defendant.

) No. P1300CR20081339

) Division 6

) **DEFENDANT'S REPLY IN**  
) **SUPPORT OF MOTION IN**  
) **LIMINE TO EXCLUDE**  
) **EVIDENCE OFFERED IN**  
) **VIOLATION OF ARIZONA**  
) **RULE OF EVIDENCE 403 AND**  
) **404(b)**

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20  
21 In order to admit prior bad act evidence the State is required to provide notice of  
22 the acts in compliance with Rule 15.1(b)(7). Then the court must find by clear and  
23 convincing evidence that the acts occurred and were committed by the person alleged to  
24 have done so. If the Court so finds, the act is not admissible to prove the character of a  
25 person or to show action in conformity therewith. Rather it is only admissible if offered  
26 as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence  
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1 of mistake or accident. The court must also consider the probative value against the  
2 prejudicial effect of such evidence pursuant to Rule 403.

3 The State should be prohibited from admitting prior bad act evidence because: 1)  
4 it has not provided proper notice of bad acts; 2) it is offering the acts for the improper  
5 purpose of proving character; 3) many of the acts have previously been excluded; and 4)  
6 the State cannot make the required clear and convincing showing for these acts. Finally  
7 this evidence should be precluded pursuant to Rule 403 based on the danger of unfair  
8 prejudice and the minimal probative value.

9 The State has never provided the notice required under Rule 15.1(b)(7).  
10 Furthermore it is clear from the State's pleading that this evidence is offered for purposes  
11 of proving Mr. DeMocker's character and not for any permitted purpose under Rule  
12 404(b). The State admits as much when it indicates that it intends to introduce the  
13 evidence in rebuttal to any "good character" evidence offered by the defense. The State's  
14 other proposed grounds of relevance strain credulity, particularly when it suggests that  
15 evidence of Mr. Democker's "sudden outburst of anger" are relevant because they  
16 "affected his compensation and overall financial condition." (Response at page 3). The  
17 State should be precluded from offering the proposed evidence because it is being offered  
18 for the sole purpose of assassinating Mr. DeMocker's character as explicitly prohibited  
19 under Rule 404(b).

20 **1. Bad Acts Are Not Proper Rebuttal Evidence of Bad Character**

21 The State's responds that it intends to offer the following bad acts as rebuttal to  
22 evidence of good character: 1) Mr. DeMocker's alleged human growth hormone use; 2)  
23 allegations regarding Mr. DeMocker's business practices, including client complaints; 3)  
24 allegations of Mr. DeMocker's extramarital relationships and 4) an unreported 2006  
25 incident involving Carol Tidmarsh. This evidence is not admissible as rebuttal evidence  
26 of "bad character." The State previously represented to the Court and the defense that it  
27 would not seek to admit evidence of Mr. DeMocker's alleged human growth hormone  
28

1 use or of his clients' alleged dissatisfaction with his handling of their accounts. The State  
2 also represented to the Court that the only allegations regarding Mr. DeMocker's  
3 extramarital affairs that it intended to offer were regarding his relationships with Barbara  
4 Onon and Renee Girard. This evidence is not "character evidence" admissible as  
5 rebuttal to evidence of "good character" under Rule 404(a). Rather, these are acts and are  
6 therefore subject to analysis under Rule 404(b).

7 Under Rule 404(b), acts are not admissible to prove the character of Mr. DeMocker.  
8 Evidence of bad acts is inadmissible to prove character by the plain language of the Rule,  
9 "evidence of other crimes, wrongs, or acts in not admissible to prove the character of a  
10 person in order to show action in conformity therewith." See Rule 404(b). The Court  
11 should advise the State in no uncertain terms that these areas are off limits at the trial in  
12 this matter either in the State's case-in-chief or in rebuttal because they are offered for an  
13 improper purpose.

14 Furthermore, general "bad character" evidence of the sort the State is attempting  
15 to smear Mr. DeMocker with, is improper. The State cites *State v. Shepherd* for the  
16 proposition that it is acceptable for it to admit general charter evidence in rebuttal.  
17 *Shepherd* stands for the opposite proposition. In *State v. Shepherd* the Court held that  
18 general rebuttal testimony is improper. *State v. Shepherd*, 27 Ariz. App. 448 (1976). In  
19 that case the defendant was a heroin addict and the Court held that it was improper  
20 rebuttal for a detective to testify that heroin is the most important thing to a heroin addict.  
21 Likewise, it would be improper rebuttal for the State to offer general "bad character"  
22 evidence as it proposes to do here.

23 This rule applies to both the guilt and penalty phase of the case. Trial courts can  
24 and should exclude evidence that is either irrelevant to the thrust of the defendant's  
25 mitigation or otherwise unfairly prejudicial. The Arizona Supreme Court has noted that  
26 "[n]othing in our death penalty statutes strips courts of their authority to exclude evidence  
27 in the penalty phase if any probative value is substantially outweighed by the prejudicial  
28

1 nature of the evidence. Trial courts should not allow the penalty phase to devolve into a  
2 limitless and standardless assault on the defendant's character and history. Rather, trial  
3 judges should exercise their broad discretion in evaluating the relevance of such bad acts  
4 evidence to any mitigation evidence offered.” *See State v. Hampton*, 213 Ariz. 167, 180  
5 (2006) (citing *See State v. McGill*, 213 Ariz. 147 156-57 ¶ 40, 140 P.3d 930, 939-40  
6 (2006) (stating that a “judge’s analysis [of evidence under A.R.S. § 13-703] involves  
7 fundamentally the same considerations as does a relevancy determination under Arizona  
8 Rule of Evidence 401 or 403”). Rebuttal evidence in the mitigation phase must comport  
9 not only with Arizona’s sentencing scheme, but also with the requirements of the Due  
10 Process Clause. *See Hampton*, 213 Ariz. at 179 ¶ 48, 140 P.3d at 962. Testimonial  
11 hearsay presented at sentencing must be “accompanied by sufficient indicia of  
12 reliability,” *McGill*, 213 Ariz. at 160 ¶ 57, 140 P.3d at 943. Confrontation rights also  
13 apply. The Confrontation Clause’s primary goal is to:

14  
15 “ensure reliability of evidence, but it is a procedural rather than a substantive  
16 guarantee. It commands, not that evidence be reliable, but that reliability be  
assessed in a particular manner: by testing in the crucible of cross-examination.”

17 *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

18  
19 The Court should advise the State that no evidence of : 1) Mr. DeMocker’s  
20 alleged human growth hormone use; 2) allegations regarding Mr. DeMocker’s business  
21 practices, including client complaints; 3) allegations of Mr. DeMocker’s extramarital  
22 relationships (other than with respect to Renee Girard and Barb O’non) and 4) an  
23 unreported 2006 incident involving Carol Tidmarsh will be permitted at either the guilt or  
24 penalty phase of this case.

## 25 **2. New Rule 404(b) Acts Identified by the State**

26 With respect to the other acts identified in the State’s response, but improperly  
27 noticed under Rule 15.1(b)(7), these acts are not offered to prove any permissible purpose  
28

1 (proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence  
2 of mistake or accident) under Rule 404(b) and should be excluded as a further improper  
3 attempt by the State to assassinate Mr. DeMocker's character. Furthermore, the Court  
4 would have to find by clear and convincing evidence that these acts took place and that  
5 Mr. DeMocker committed the acts. Finally even if the Court did somehow make such a  
6 finding these acts should be excluded because their probative value is substantially  
7 outweighed by the danger of unfair prejudice.

8 These newly alleged acts include the following: 2) allegations of two occasions of  
9 Mr. DeMocker's "sudden outbursts of anger" towards Ms. O'non; and 2) Mr.  
10 DeMocker's business practices as they relate to his relationship with Ms. O'non. These  
11 acts are not relevant for any proper purpose. With no explanation, the State alleges that  
12 these "affected [Mr. DeMocker's] compensation and overall financial condition."  
13 (Response at 3). Again, this proposed relevance strains credulity. The split of the  
14 business relationship between Ms. O'non and Mr. DeMocker was largely complete as of  
15 July 2008. It resulted in a split of the client business in precisely the same way Ms. O'non  
16 and Mr. DeMocker had previously split the business between them – resulting in a net  
17 neutral to both Mr. DeMocker and Ms. O'non. The unreported, unobserved alleged  
18 confrontations between Ms. O'non and Mr. DeMocker should likewise be excluded. Ms.  
19 O'non never reported these events. No one ever witnessed these events even though they  
20 supposedly occurred at their place of employment. Ms. O'non continued her romantic  
21 relationship with Mr. DeMocker after these events. And, there was no threat or physical  
22 contact during these events according to Ms. O'non. These acts are simply not relevant  
23 to any fact at issue or to any permitted purpose under Rule 404(b). Even if this were  
24 determined by the Court to be in some way relevant for some permitted purpose, the  
25 probative value of these issues is substantially outweighed by the danger of unfair  
26 prejudice. This evidence should therefore be excluded pursuant to Rule 403.

27 **3. Evidence Should Be Excluded Under Rule 403**

1 Arizona Rule of Evidence 403 provides that relevant evidence may be excluded if its  
2 probative value is substantially outweighed by the danger of unfair prejudice, confusion  
3 of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or  
4 needless presentation of cumulative evidence. The Rule 403 balancing test "is important  
5 in analyzing any Rule 404 (b) evidentiary question." *State v. Moreno*, 153 Ariz. 67, 69,  
6 734 P.2d 609, 611 (Ct.App.1986), *cert. denied*, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d  
7 177 (1987).

8 [B]ecause of the risk of improper use, the trial judge has a special  
9 obligation to insure that [the] probative value of the evidence for the  
10 purpose offered is sufficiently great in the context of the case to warrant  
11 running that risk. The discretion of the trial judge under Rule 403 to  
12 exclude otherwise relevant evidence because of the risk of prejudice should  
13 find its most frequent application in this area.

14 Udall & Livermore, *supra* note 3, at § 84, pp. 179-80 (footnote omitted).

15 The above evidence should also be excluded under Rule 403. The probative value  
16 of the evidence is minimal. The State has not offered any probative value other than  
17 rebuttal of speculated "good character" evidence. On the other hand, the risk of unfair  
18 prejudice to Mr. DeMocker is substantial. Allegations that he used HGH, had  
19 extramarital affairs, had client complaints, had an unreported 2006 incident with Carol  
20 Tidmarsh, and "sudden outbursts of anger" towards Ms. O'non are clearly meant to tar  
21 his image and inflame the jury and have no other purpose in this case. These issues  
22 should be excluded pursuant to Rule 403.

23 The following evidence should also be excluded under Rule 403 analysis: 1)  
24 allegations that Mr. DeMocker told Ms. O'non that he and his daughters would be better  
25 off if Carol were dead; and 2) allegations that Mr. DeMocker told Ms. O'non shortly after  
26 Carol's murder that Carol's death was the result of an accident. Both of these statements  
27 are of limited probative value. Ms. O'non does not know when Mr. DeMocker made  
28 these statements or where. With respect to the first statement she did not take Mr.

1 DeMocker seriously or literally. Both statements' limited probative value are outweighed  
2 by the substantial likelihood that jurors would be unfairly prejudiced. Therefore, the  
3 Court should exclude these statements under Rule 403.

4 **CONCLUSION**

5 The State is attempting to supplant evidence with character assassination. The  
6 proposed testimony is not relevant and is offered for no purpose other than to distract the  
7 jurors from the lack of physical evidence in the case. The Court should exclude this  
8 evidence under Rule 404(b) and 403.

9 DATED this 16<sup>th</sup> day of March, 2010.

10  
11 By: \_\_\_\_\_

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1 **ORIGINAL** of the foregoing filed  
2 this 16<sup>th</sup> day of March, 2010, with:

3 Jeanne Hicks  
4 Clerk of the Court  
5 Yavapai County Superior Court  
6 120 S. Cortez  
7 Prescott, AZ 86303

8 **COPIES** of the foregoing hand delivered  
9 this 16<sup>th</sup> day of March, 2010, to:

10 The Hon. Thomas B. Lindberg  
11 Judge of the Superior Court  
12 Division Six  
13 120 S. Cortez  
14 Prescott, AZ 86303

15 Joseph Butner, Esq.  
16 Office of the Yavapai County Attorney  
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